Supreme Court, U.S.
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No. 94-1226

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FLEMING FOODS OF ALABAMA, INC.,

Petitioner,

vs.

DEPARTMENT OF REVENUE,
STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alabama Use Tax, found at §40-23-61(c), Code of Alabama 1975, can be applied to trucks and trailers purchased at retail outside the State and based at the Geneva, Alabama facility, when the vehicles are also used in an interstate business?

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STATEMENT OF THE CASE

Respondent, Department of Revenue State of Alabama ("Alabama"), agrees with the "Statement" of Petitioner, Fleming Foods of Alabama, Inc. ("Fleming Foods") in its Petition For Writ of Certiorari with the following exceptions and clarifications. Alabama states that Fleming Foods acquired the use of the trucks and trailers by way of purchase through its parent corporation, Fleming Companies, Inc. See paragraph 3, Proposed Stipulation of Facts, page 24a, Petitioner's Petition for a Writ of Certiorari.

Alabama agrees that no sales tax was paid to any other state when the trucks and trailers were purchased at retail outside the State of Alabama. There is also no evidence that any other state has attempted to assess a use tax on the trucks and vehicles purchased at retail by Fleming Foods. However, if another state were to impose a similar tax on the trucks and trailers, Alabama would allow a credit against its use tax under §40-23-65, Code of Alabama 1975. The trucks and trailers would

not be subject to Alabama's use tax if a sales or use tax equal to or greater than the Alabama tax is paid to another state. If the amount of tax paid to another state is less than the Alabama tax, Fleming Foods would only be required to pay the difference between the other state's tax and the Alabama tax.

ARGUMENT

I. INTRODUCTION

The Alabama Supreme Court in its opinion, which is reported at 648 So.2d 577 (Ala. 1994), completely and correctly decided the constitutional questions raised by Fleming Foods. After presenting a history of the case, the Alabama Supreme Court cited Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) for the proposition that the Alabama use tax found at §40-23-61(c) does not violate the Commerce Clause of the United States Constitution if: "(1) there is a substantial nexus between the activity and the taxing state; (2) the tax is

fairly apportioned; (3) the tax is nondiscriminatory; and (4) it is reasonably related to the services and protection provided by the taxing state." The Alabama Supreme Court agreed with the Alabama Court of Civil Appeals that the first and fourth prongs of the Complete Auto Transit test had been met. The Alabama Supreme Court disagreed with the Alabama Court of Civil Appeals' opinion that use tax violated the second and third prong of the Complete Auto Transit test.

The Alabama Supreme Court stated that unlike the taxes in Goldberg v. Sweet, 488 U.S. 252 (1989) which involved a tax on revenues generated from carrying on an interstate business, the Alabama use tax is not a recurring annual tax, but is instead "a one time tax levied at the same rate as the sales tax and is complimentary to the sales tax". The Alabama Supreme Court referenced 68 Am. Jur.2d, Sales and Use Tax, §188 (19____) for the proposition that it is generally understood that providing of a credit for any sales or use tax paid to another state makes the

use tax externally consistent, thereby avoiding multiple taxation.

The Alabama Supreme Court also recognized that if Fleming Foods had purchased the vehicles from an Alabama dealer, the vehicles would have been subject to the Alabama sales tax at the time of sale and exempt from any use tax in Alabama. The Court recognized that the purpose of the use tax is to prevent a taxpayer from avoiding the State sales tax by purchasing goods outside the State.

II. THE JEFFERSON LINES CASE AND AMERICAN TRUCKING ASS'NS V. SCHEINER DO NOT PROVIDE SUPPORT FOR GRANTING CERTIORARI IN THE PRESENT CASE.

Alabama does not agree that the facts and circumstances in Oklahoma v. Jefferson Lines, Inc., Cert. granted 114 S.Ct. 2672 (1994) (No. 93-1677), are the same as those in the present case. Nor does Alabama agreed with Petitioner's implication that Certiorari should be granted in this case because it was granted in the Jefferson Lines case.

In its "Reason for Granting the Petition" Fleming Foods asserts that the Alabama use tax raises the same fundamental constitutional issues concerning apportionment of State taxes in order to satisfy the Commerce Clause as the Jefferson Lines case. Fleming Foods compares the present case with Jefferson Lines by asserting that the Alabama use tax should be apportioned based on the miles traveled within the State of Alabama as compared to total miles in all states. This assertion incorrectly implies that the Alabama use tax is imposed on a portion of Fleming Foods' business that occurs outside the State of Alabama.

Although the price of the bus tickets and the amount of tax imposed by Oklahoma in Jefferson Lines may vary because of the distance traveled, the Alabama use tax is not imposed upon revenues generated by the use of the trucks and trailers. The taxable measure for the Alabama use tax is the retail purchase price of the trucks and trailers. The tax does not vary with the number of miles traveled by the Petitioner's trucks and trailers. The

Alabama use tax is imposed upon the retail purchase of tangible personal property. It is not a tax on the revenues generated from providing of a service, such as the tax that is present in the Jefferson Lines case.

The Petitioner also asserts that the decision of the Alabama Supreme Court is inconsistent with this Court's decision in American Trucking Association v. Scheiner, 483 U.S. 266 (1987). The Taxpayer asserts that the Alabama use tax unconstitutionally discriminates against instrumentalities of interstate commerce. However, the Alabama use tax is not a recurring annual lump sum tax such as those taxes that were present in the American Trucking Association v. Scheiner case.

III. THE DECISION OF THE ALABAMA SUPREME COURT DOES NOT CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

A use tax such as Alabama's has been recognized by this Court as being complimentary to a state sales tax. Henneford v. Silas Mason Company, 300 U.S. 577 (1937). When viewed together the "practical effect" is to tax the

out-of-state purchase of goods to the same extent as an equivalent in-state purchase. No preferential treatment is given to the in-state purchase of trucks and trailers over the out-of-state purchase of those same trucks and trailers. As previously pointed out, Alabama allows a credit for any sales or use tax paid to any other state, thereby avoiding the threat of multiple taxation on the retail purchase of the trucks and trailers.

Fleming Foods asserts that the Alabama use tax unconstitutionally burdens interstate commerce because the tax is not apportioned in accordance with the percentage of actual use of the vehicles in Alabama as compared to total use. However, the Petitioner's position ignores the fact that the apportionment prong of the Complete Auto test is satisfied by providing a credit for sales or use taxes paid to other states.

In addition, the Alabama use tax statute defines the term "use" at §40-23-60(8), Code of Alabama 1975 as "the exercise of any right or power over tangible personal property incident to

ownership of that property, . . ." Clearly the term "use" is not limited to merely the physical use of the tangible personal property. The decision to use the trucks to carry on an interstate business from the Geneva, Alabama location is the exercise of an incidence of ownership over the trucks and trailers. Such a "use" of the trucks is subject to the Alabama use tax which is levied at §40-23-61(c).

Although Fleming Foods correctly cites numerous cases for the proposition that a state can only tax its fair share of an interstate transaction, such citations are not applicable to the facts of the present case. There is simply no revenue generated by Fleming Foods from outside Alabama which Alabama seeks to tax. The Alabama use tax is assessed upon the purchase at retail of trucks and trailers outside the State of Alabama which have been brought into Alabama and based at the Geneva, Alabama facility for "storage, use or consumption in this State".

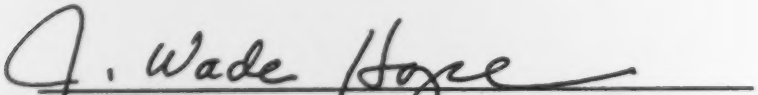
The State of Alabama does not attempt to provide an unfair advantage for its in-state businesses as opposed

to an out-of-state business. Fleming Foods is an Alabama based with the trucks based in Geneva, Alabama. If the trucks had been purchased from an Alabama dealer, the same amount of tax would have been collected under the sales tax.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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